1992

DONNA L. WATTS, Plaintiff and Appellee, vs. WESLEY K. WATTS, Defendant and Appellant : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

DONNA L. WATTS, Plaintiff/Appellee, vs. WESLEY K. WATTS, Defendant/Appellant.	COURT OF APPEALS 920870 CA Argument Classification No. 15

BRIEF OF THE APPELLANT

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The Honorable J. DENNIS FREDERICK, Third District Court Judge Presiding

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The caption of the case sets forth the names of each party of interest in the proceeding

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STATEMENT SHOWING JURISDICTION

This is an appeal to the Utah Court of Appeals, from a final order, entered by the Honorable J. DENNIS FREDERICK, Judge for the Third Judicial District Court In and For the County of Salt Lake, State of Utah, wherein the said court denied and dismissed husband's post decree Order to Show Cause, In Re: contempt and for payment of lien interest in real property, and dismissal of husband's petition to modify, and said appeal is authorized pursuant to Section 78-2a-3(2)(h) Utah Code Annotated, as amended in 1992, and Rule 3, Utah Rules of Appellate Procedure.

STANDARD OF REVIEW
STATEMENT OF THE ISSUES

1. The trial court below failed to duly order that the wife should forthwith pay husband his vested lien interest in said marital residence, the "trigger events" being inequitable as a matter of law. The standard of review is a mixed question of law and fact, and reviewed for correctness by the appellate court with no deference to the lower court court's determination or the conclusion reached by the trial court. Haddow v. Haddow, 707 P2d 669 (Ut. 1985).

2. The trial court below improperly denied husband's order to show cause In Re: Contempt and for an order compelling the wife to forthwith pay husband his vested lien interest, and an order dismissing the husband's petition to modify. Thereby denying the husband his opportunity to present evidence of a substantial

material change of circumstances that may support an order for modification of the decree as requested. The standard of review is a question of fact. The trial court abused it discretion. See, Janse v. Janse, 748 P2d 1249 (Utah, 1989).

DETERMINATIVE PROVISIONS, STATUTES AND RULES

Section 30-3-5(3) Utah Code Annotated provides in pertinent part as follows, that:

> "the Court has continuing jurisdiction to make subsequent changes or new orders... the distribution of the property and obligations for debts as is reasonable and necessary";

and by analogy, contrast and comparison,

Section 30-3-5(5), Utah Code Annotated provides in pertinent part as follows, that:

> "unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse; however if the subsequent marriage is annulled and found to be void ab initio, payment of alimony shall resume from the prior marriage **only if the party who was ordered to pay alimony in the previous proceeding is joined in the pending annulment action so that party's rights can properly be determined";** emphasis added

STATEMENT OF THE CASE
NATURE OF THE CASE

The wife, was granted an default divorce pursuant to her complaint on or about the 20th day of April, 1983. The husband, was properly before the Third District Court in said proceeding, he having duly executed and filed a waiver therein. The Divorce Decree provided, among other things, that the wife be awarded the

marital residence of the parties' subject to a "shall pay" lien interest in favor of the husband in the sum of Twenty Four ($24,000.00) Dollars. The said lien interest shall be due and payable to the husband when either of the following contingencies first occurs:

"when the home is sold"; or
"six years after the wife remarries".

The wife married one Denna Landon Scott, the 8th day of August, 1986. On or about the 20th day of October, 1987, the said marriage to Mr. Scott was annulled by the Third District Court, Salt Lake County, State of Utah, Case No. 864904250. The husband was not made a party to said annulment proceeding.

On or after the 8th day of August, 1992, the six year condition for payment of husband's lien interest, as ordered by the divorce decree, had occurred. The husband made timely demand on the wife for payment of said lien interest. The husband contended that the triggering condition for the payment of his vested lien interest in marital property had occurred, to wit: wife had married Mr. Scott on the 8th day of August, 1986, and husband made demand for payment of said lien interest on or after the 8th day of August, 1992. The wife has refused and continues to refuse to pay to the husband the vested lien interest.

COURSE OF PROCEEDINGS

The husband filed an order to show cause, In Re: Contempt, and For an order directing the wife pay the vested lien interest

awarded to him pursuant to the divorce decree entered herein. The husband also filed a Petition to Modify.

DISPOSITION AT THE TRIAL COURT

Husband's order to show cause came on regularly for hearing on Friday, the 30th day of October, 1992. The Third District Court Domestic Relations Commissioner recommended the following, that: the wife, not be found in contempt of court; the foregoing was based on a finding that neither of the court decreed "triggering events" that created a duty for the wife to forthwith pay husband's vested lien interest had occurred, and that husband's petition to modify was dismissed.

The husband objected to the recommendation of the Third District Court Domestic Relations Commissioner, and not withstanding said objection, said recommendation became the order in the case on the 23rd day of November, 1992, and it is from the Third District Court's order denying husband's right to be paid his vested lien interest in the marital estate, and the court's dismissal of husband's petition to modify, that the within appeal is taken.

SUMMARY OF ARGUMENT

The trial court below erred or abused it discretion by failing to order the wife to pay husband his vested lien interest in the marital residence as a matter of law. The "triggering events" ordered by the court in the decree are exclusively in the control

of the wife and therefore inequitable as a matter of law.

The trial court below did have jurisdiction to make subsequent changes or new orders in the instant case pursuant to Section 30-3-5(3) Utah Code Annotated, 1953 as Amended. The Husband herein was improperly denied his day in court to introduce evidence to show a change of circumstances that may support an order for modification of the original decree herein.

Notwithstanding the foregoing, and independent therefrom, in the event the within court finds that the award of the residence to the wife is deemed to be an award other than alimony, i.e. a property award, division or distribution, then, in that event, absent a controlling provision of law, the terms of the divorce decree are controlling. In the instant case the divorce decree sets forth the "triggering events" that gives rise to the duty for the wife to pay the husband. The "triggering event" of "when the residence is sold" is clear and unambiguous. However, the "triggering event", the subject of the within appeal, of "wife's marriage to another plus the passage of Six (6) years," is subject to numerous interpretations. What is "marriage to another" and must it be solemnized? The language does not require that the wife be married for Six (6) years, what if marriage ends before six years has elapsed: by divorce; the new spouse dies, deserts or permanently estranges himself from the wife; or what if the marriage is annulled?

There is statutory law in Utah that in the case where a

divorced spouse is receiving alimony and subsequently marries another, absent an exception in the divorce decree, alimony, by operation of law, terminates, and the alimony can only be reinstated if the party previously ordered to pay alimony is made a party in the annulment proceeding, and the court so orders the terminated alimony reinstated. Likewise, and by analogy, the same rule as set forth in Section 30-3-5(5) Utah Code Annotated, as amended 1952, should apply to property divisions that are conditioned on the obligor spouse's marriage to another. To rule otherwise is to create an unreasonable classification.

DETAIL OF THE ARGUMENT

ARGUMENT I

WHEN INTERPRETING A DECREE, PARTICULARLY IN DIVORCE PROCEEDING, THE IMPORTANT OBJECT IS TO CARRY OUT THE PURPOSE AND INTENT OF THE COURT THAT ISSUED THE DECREE

Counsel for the husband was unable to discover Utah case law that specifically addressed the issues raised on appeal. The dissenting opinion in Chandler v. West, 610 P2d 1299, 1302 (Utah, 1980), stated the correct and proper rationale that the court must apply when interpreting decrees, and the property settlement provisions set forth therein, Justice Maughn, at page 1302 of his dissenting opinion, citing Cain v. Cain, 575 P2d 468 (Haw, 1978), and Cain, ibid, was more fully expanded by Hana Ranch, Inc. v. Kunakahi, 726 P2d 1023 (Haw. App., 1986), holds:

> Interpretations or construction of a judgment, decree or order presents a question of law, a trial court's interpretation or

> construction is not binding on an appellate court and is fully reviewable on appeal.... when interpreting a decree, particularly in a divorce proceeding, the important object is to carry out the purpose and intent of the court that issued the decree.

The purpose and intent of the divorce decree in the instant case, and all other divorce proceedings, among other things, is to make an equitable division of the parties' marital property at the time of the granting of the divorce decree. See, Miller v. Miller, 683 P2d 319 (Ariz. App., 1984). At the point of entry, said decree specifically awarded the husband in the instant case a vested interest in the marital residence in the sum of $24,000.00, to be paid in the future, and that interest so awarded did constitute an immediate, present and vested separate property interest. See, Koelsch v. Koelsch, 713 P2d 1234 (Ariz, 1986). The foregoing cited case dealt with retirement benefits, but its holding is applicable to the delayed "pay-out" of the vested lien interest in the marital residence in the instant case. The court in the Koelsch, Ibid, held at page 181, that:

> "It is well settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community property interest of the other spouse."

In the instant case the condition(s) for "pay-out", as previously set forth are as follows: "when the property is sold"; or "when the wife remarries and the elapsing of six (6) years following said marriage". It is submitted that both conditions are unequivocally in the control of the wife. As a matter of law the distribution scheme in the instant case is inequitable. See, Hardin

v. Hardin, 788 P2d 1252 (Ariz. App., 1990).

In the Hardin, case ibid, at page 1255, the "triggering event", similar to one in the instant case, was "when the property is sold", the court held that:

> "the effect of the trial court's award was to give appellant an immediate separate property interest wholly within the control of the appellee".

Hardin, ibid, at page 1255, goes on to cite Chrane v. Chrane, 649 P2d 1384 (NM. 1982), which speaks directly to the remarriage issue, when it held that:

> a lien against the former family residence payable upon the sale of the house or the ex-spouse's remarriage or death was an inequitable distribution of the community estate. The court went on to reason: The net effect of leaving the home to the wife until she remarries or dies or decides to sell it, is to divest the husband of his equity in the property. In fact, he may never live to receive any portion of that equity.

The court in Hardin, Ibid, at page 1255, went on to further hold that substantial time delays are also per se inequitable, even if the possessing spouse pays interest, the interest issue was not a provision that was part of the decree in the instant case, see In Re: Marriage of Salter, 609 P2d 374 (Ore. App., 1980).

It is undisputed that the purpose and intent of the court in the instant divorce proceedings, was among other things, to make an "equitable division" of the marital estate of the parties herein. The parties, were at the time of the entry of the divorce decree without minor children, without any other type of continuing entanglement that would justify the inordinate delay in the "pay-out" of husband's vested lien interest herein, and yet, more than

ten (10) years have elapsed since the date of the entry of the divorce decree herein. The husband's vested lien interest, as recognized by the court at the time of entry of the divorce decree and subsequent hearings herein, was and is the sum of $24,000.00. From the time of entry of the decree and subsequent hearings thereon, there remains no time certain outside the exclusive control of the possessing party, the wife, as to when said vested lien interest must be paid. Such unilateral control over the "triggering event" is inequitable at law, and clearly fails to meet the purpose and intent of the court in such proceedings.

The court below erred or abused it discretion by failing to order that the wife forthwith pay the vested lien interest to the husband, and by dismissing the husband's Petition to Modify, and said orders should be reversed. Also under Section 30-3-5(3) Utah Code Annotated, 1953 as amended, when the wife's remarriage to Mr. Scott was annulled, the court could have considered ordering Mr. Scott to pay husband his vested lien interest if wife had so requested.

ARGUMENT II

AS A GENERAL RULE, ORDERED ALIMONY TERMINATES UPON THE REMARRIAGE BY THE RECEIVING SPOUSE, EVEN IF THE SUBSEQUENT MARRIAGE IS ANNULLED

The legislature in the State of Utah has enacted statutes that mandate procedures for handling certain post decree alimony issues that are not within the scope of the provisions of the divorce

decree itself. See, Section 30-3-5(5) Utah Code Annotated, 1953, as amended, provides in pertinent part as follows, that:

> "unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse; however if the subsequent marriage is annulled and found to be void ab initio, payment of alimony shall resume from the prior marriage **only if the party who was ordered to pay alimony in the previous proceeding is joined in the pending annulment action so that party's rights can properly be determined";** emphasis added

Likewise, case law has held as follows, that:

> ... alimony terminated upon remarriage; and that it was not automatically re-instated by the annulment, see Russell v. Russell, 587 P2d 133 (Utah, 1978, citing Ferguson v. Ferguson, 564 P2d 1380 (Utah 1977).

In the instant case the provisions of the decree provided the terms as to when the vested lien interest was to be paid to the husband. The wife married another, one Denna Landon Scott, on or about the 8th day of August, 1986. The wife's subsequent marriage was annulled, on or about the 20th day of October, 1987, however notwithstanding the annulment, and as proscribed by the terms of the divorce decree previously entered herein, Six (6) years had elapsed since the marriage of the wife to Mr. Scott and husband's demand for payment of his vested lien interest from his former wife. If the husband's vested lien interest is deemed by the within court to be alimony, or in the alternative, if not deemed to be alimony, it should be treated the same or similarly thereto by analogy, and the foregoing statute, i.e. Section 30-3-5(5) Utah Code Annotated, 1953, as amended would then be dispositive of the

disputed issues herein.

In the proceedings below, the trial court erred or abused its discretion when it dismissed husband's Order to Show Cause In Re: Contempt and Why Wife should not be ordered to forthwith pay Husband's Vested Lien Interest. The said order of dismissal should be reversed and the wife should be found in contempt of court, and punished accordingly, and it should be further ordered that the wife forthwith pay the husband his claimed vested lien interest in the sum of $24,000.00, together with reasonable interest thereon. See, Eames v. Eames, 735 P2d 395 (Utah App., 1987), the court in said case held, at page 399, as follows, that:

> When a residence is a major marital asset, it has become quite common to order it sold and the net proceeds divided. It is to be expected that the equity share of the spouse who does not have the pre-sale use and benefit of the residence will accrue interest at some reasonable rate, even though the interest might not be payable until the sale proceeds are available.

ARGUMENT III

MARITAL PROPERTY SETTLEMENT PROVISIONS OF DIVORCE DECREES ARE SUBJECT TO THE CONTINUING JURISDICTION OF THE COURT

The trial court below does have continuing jurisdiction to change, make a new or modify existing orders previously entered as provisions of a divorce decree. Said orders of modification can be entered to modify provisions relating to distributions of marital property, see Section 30-3-5(3) Utah Code Annotated, 1953 as amended, which provides in pertinent part as follows, that:

> "the Court has continuing jurisdiction to make subsequent changes or new orders... the distribution of the property and obligations for debts as is reasonable and necessary";

The case law, when interpreting said section, held in Chandler v. West, 610 P2d 1299, 1300 (Utah, 1980), and subsequently reaffirmed in Whitehouse v. Whitehouse, 790 P2d 57 (Utah Ct. App. 1990), that:

> "property settlements are entitled to greater sanctity than alimony and support payments in proceedings to modify divorce decrees." the court went on to emphasize that "property settlements are not sacrosanct and are not beyond the power of a court of equity to modify."

Notwithstanding the alleged clarity of the "triggering events" language, the husband is entitled to his day in court on the issue of whether there has been a substantial change of material circumstances subsequent to the entry of the divorce decree not contemplated at the time of the entry of the decree that would allow the court below to modify the provision or provisions as requested. See Muir v. Muir, 200 Utah Adv. Retp. 41 (1992) (Citing Jense v. Jense, 748 P2d 1249, 1251 (Utah App. 1989), Cert dismissed, 795 P2d 1139 (Utah, 1990); Woodward v. Woodward, 709 P2d 393, 394 (Utah, 1985) (per curiam).

The trial court below erred or abused its discretion when it dismissed husband's Petition to Modify in the proceedings below, and said order of dismissal should be reversed and the husband's Petition to Modify reinstated forthwith.

CONCLUSION

The court below should be reversed. The wife should be ordered to forthwith pay to the husband his vested lien interest in the marital residence in the sum of $24,000.00, plus interest thereon. As a matter of law, the provisions of the decree that proscribed the "triggering events" were and are inequitable. The "triggering events" were each in the exclusive control of the wife.

The court below should be reversed. The husband's petition to modify was improperly dismissed, and it should be reinstated forthwith. The trial court below did have continuing jurisdiction to hear husband's petition to modify. The husband is entitled to present his evidence to prove a material substantial change of circumstances that may justify a modification of the decree herein.

The court below should be reversed. By analogy, the annulled remarriage of the wife and the payment of the vested lien interest of the husband, should be subject to the same statutory provisions, i.e. Section 30-3-5(5) Utah Code Annotated, 1953 as amended, as termination of alimony by remarriage. It is submitted that for the purposes of the property settlement the "act of marriage" is sufficient to terminate, or as in the instant case, "trigger" payment, unless the party claiming the relief as a result of the marriage is made a "party in interest" in the annulment proceeding.

The within case can be decided on the following four factors:

1. The lawful marriage of the Mr. and Mrs. Watts to one another.

2. The lawful default divorce of the Watts from one another.

3. The Utah Statute Section 30-3-5(5) enacted to give validity and to protect the first divorced spouse (Mr. Watts) in the event of remarriage of the former wife (Mrs. Watts) to another, and thereafter the wife cohabited as husband and wife with the new husband, and after so residing for more than one year obtained an annulment.

4. The Utah Statute Section 30-1-4.5 enacted to give validity to an non solemnized marriage relationship created not withstanding the lawful technicality the solemnized remarriage was defective through no fault of the first husband, Mr. Watts.

DATED this 17th day of May, 1993.

RESPECTFULLY SUBMITTED

GEORGE H. SEARLE
Attorney for the
Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 1993, that Two (2) true and correct copies of APPELLANTS BRIEF, were duly hand delivered to counsel for the Appellee at the following address:

THOMAS R. KING
Attorney at Law
4 Triad Center, Suite 825
Salt Lake City, Utah 84180

ADDENDUM

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

30-1-4.5. Validity of marriage not solemnized.

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:

(a) are capable of giving consent;

(b) are legally capable of entering a solemnized marriage under the provisions of this chapter;

(c) have cohabited;

(d) mutually assume marital rights, duties, and obligations; and

(e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

(2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

that occurred prior to and were independent of the taint of the unlawful invasions, was permissible. We believe the same is true in this case.

Although the state could argue that testimony of the officers about the delivery of the marijuana would be permissible because no Fourth Amendment violation was involved to that point, events from the time of the entry of the officers into the home, as well as the fruits of their search of it, were properly suppressed. Failure to suppress would, as appellee points out, completely emasculate the warrant requirements of the Fourth Amendment because probable cause is usually based on independent information obtained by the officers. To allow them entry into a home without a warrant would eliminate any protection afforded by the Fourth Amendment.

The suppression order of the trial court was proper.

LIVERMORE, P.J., and LACAGNINA, J., concur.

163 Ariz. 501

In re the Marriage of Richard Allen HARDIN, Petitioner-Appellant,

v.

Patricia HARDIN, Respondent-Appellee.

No. 1 CA-CV 88-586.

Court of Appeals of Arizona, Division 1, Department B.

March 1, 1990.

Husband appealed from judgment of the Superior Court, Yuma County, Cause No. 54999, H. Stewart Bradshaw, J., entered in dissolution proceeding. The Court of Appeals, Voss, P.J., held that: (1) trial court's determination that wife was "in need of assistance," together with its consideration of parties' relative financial positions and wife's station in life as the result of marriage, was sufficient to support award of spousal maintenance, but (2) judgment dividing community property which gave husband lien on family home, payable upon sale of property, improperly deprived husband of his vested property interest in community.

Remanded.

1. Divorce ⇐286(3)

Review of order awarding spousal maintenance is limited to determining whether trial court abused its discretion. A.R.S. § 25-319.

2. Appeal and Error ⇐907(2)

Without transcript of trial, Court of Appeals was required to assume that evidence presented to trial court was sufficient to support it findings. 16 A.R.S. Rules Civ.Proc., Rule 11(b).

3. Divorce ⇐237

Husband's failure to contribute to family finances prior to dissolution was inappropriate basis upon which to award spousal maintenance. A.R.S. § 25-319.

4. Divorce ⇐237

Trial court's determination that wife was "in need of assistance," together witih its consideration of parties' relative financial positions and wife's station in life as the result of marriage, was sufficient to support award of spousal maintenance. A.R.S. § 25-319.

5. Divorce ⇐252.3(2)

Trial court's division of community property need not be exact, but it must result in substantial equity.

6. Divorce ⇐252.3(2)

Upon dissolution, community property is divided such that each party receives immediate, present, and vested separate interest.

7. Divorce ⇐252.5(3)

Judgment dividing community property which gave husband lien on family home, payable upon sale of property, improperly deprived husband of his vested

interest in community, where date of sale was not specified in order. A.R.S. § 25–318.

Bruce Yancey, Yuma, for petitioner-appellant.

Community Legal Services by Michael Figgins, Yuma, for respondent-appellee.

VOSS, Presiding Judge.

Appellant raises two issues for our review. First, whether the trial court abused its discretion in awarding spousal maintenance to appellee; and second, whether the trial court failed to make an equitable division of the community estate in awarding appellant a judgment enforceable by a "non-specific" lien on the family residence awarded the appellee. We affirm the trial court's award of spousal maintenance, but reverse and remand with respect to the division of the community estate.

Background

Appellant and appellee were married February 17, 1985. During the course of the marriage, the parties purchased a family residence in Yuma, Arizona. On October 20, 1987, appellant filed a petition for dissolution in Yuma County. The matter was tried to the court and an order setting forth the court's ruling was filed September 14, 1988. Appellant's motion to reconsider was denied. A decree of dissolution was filed December 9, 1988. Appellant appeals from both the denial of his motion for reconsideration and the underlying judgment.

Spousal Maintenance

The trial court awarded appellee $200 per month for thirty months for spousal maintenance. Appellant argues that the trial court abused its discretion in basing the award of spousal maintenance on appellant's failure to adequately help with family expenses prior to the dissolution. Appellant asserts that he paid a substantial portion of the family expenses and that therefore trial court's factual conclusion is incorrect.

[1] The trial court's grant of spousal maintenance is governed under A.R.S. § 25–319.[1] An award of spousal maintenance is within the sound discretion of the trial court. *Battiste v. Battiste*, 135 Ariz. 470, 662 P.2d 145 (App.1983); *In re Marriage of Hinkston*, 133 Ariz. 592, 653 P.2d 49 (App.1982). Our review is limited to determining whether the trial court abused its discretion in awarding spousal maintenance. *In re Marriage of Berger*, 140 Ariz. 156, 680 P.2d 1217 (App.1983).

The trial court made the following findings in an order dated September 14, 1988:

> 6. The Respondent has requested that she receive spousal maintenance. The record shows that the Petitioner contributed no funds to pay community debts for a period of several months, except to pay some $345.00 on the home property.
>
> 7. The Respondent is in need of assistance. The Petitioner is capable of earning for [sic] in excess of what he is presently earning. The Respondent's need and station in life in which Petitioner placed her should require that the Petitioner pay to the Respondent the sum of $200.00 per month as and for spousal maintenance for a period of thirty months beginning October 1, 1988.

[2] Appellant failed to provide this court with a transcript of the trial court proceedings. *See* Arizona Rules of Civil Appellate Procedure, Rule 11(b). The record in this appeal consists of the parties' briefs and a copy of the clerk's file. Without a transcript of the trial, we must assume that the evidence presented to the trial court was sufficient to support its

1. A.R.S. § 25–319 states in pertinent part:

> A. In a proceeding for dissolution of marriage or legal separation ... the court may grant a maintenance order for either spouse for any of the following reasons if it finds that the spouse seeking maintenance:
>
> 1. Lacks sufficient property, including property apportioned to such spouse, to provide for his or her reasonable needs.
>
> 2. Is unable to support himself or herself through appropriate employment ... or lacks earning ability in the labor market adequate to support himself or herself.

findings. *Renner v. Kehl*, 150 Ariz. 94, 722 P.2d 262 (1986).

[3] In awarding spousal maintenance it appears that the trial court found that appellant failed to contribute to the family finances for some period prior to dissolution. While this might be a proper consideration in dividing the community property, we believe it is an inappropriate basis upon which to award spousal maintenance. *See Buttram v. Buttram*, 122 Ariz. 581, 596 P.2d 719 (App.1979) (spousal maintenance does not encompass settlement of property issues). Were this finding relied on exclusively for the award, we would be inclined to reverse. However, in addition to this finding, the trial court stated other findings which we believe focus on issues properly concerning maintenance.

[4] The trial court noted that the appellee was "in need of assistance." While this language is broad, we believe it is sufficient under either A.R.S. § 25-319(A)(1) or (2) as indicating an insufficient property base or inadequate labor skills with which appellee could support herself. The trial court also noted the parties' relative financial positions and appellee's present station in life as a result of this marriage. All of this is appropriate initially for determining the need for spousal maintenance. We again note that the trial court is given wide latitude in awarding spousal maintenance and we will not interfere unless a clear abuse is shown. *In re Marriage of Hinkston*, 133 Ariz. at 593, 653 P.2d at 50. We are unable to say, with the record before us, that the trial court clearly abused its discretion.

Division of Community Property

In dividing the community property, the court awarded appellee the family home and appellant a lien thereon. The lien was set in an amount equal to one-half the net sale price of the family home or the sum of $17,500 whichever is less. The trial court's order did not provide a date upon which the lien was to be paid, nor did it provide for interest.

Appellant argues that the trial court abused its discretion in dividing the community estate by awarding appellant the "non-specific" lien. Appellant contends that a lien which does not contain any provision as to when it may be realized fails as an equitable division of property under A.R.S. § 25-318.[2] We agree.

[5, 6] The trial court's division of community property need not be exact, but it must result in substantial equality. *Miller v. Miller*, 140 Ariz. 520, 683 P.2d 319 (App. 1984). "In exercising its discretion the court has to award a substantial equivalent to each spouse because an uneven distribution unconstitutionally deprives the spouse of a vested interest." 3 C.M. Smith & I. Cantor, *Arizona Marriage Dissolution Practice* § 323, at 360 (1988). Upon dissolution, community property is divided such that each party receives an immediate, present, and vested separate property interest. *Koelsch v. Koelsch*, 148 Ariz. 176, 713 P.2d 1234 (1986).

> Our supreme court stated:
> It is a "settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse." *In re Marriage of Stenquist*, 21 Cal.3d 779, 786, 582 P.2d 96, 100, 148 Cal.Rptr. 9, 13 (1978). This principle has even stronger applicability when the property wholly within the control of another is the separate property of an ex-spouse. *See In re Marriage of Gillmore*, 29 Cal.3d 418, 423, 629 P.2d 1, 4, 174 Cal.Rptr. 493, 496 (1981).

Id. at 181, 713 P.2d at 1239. While *Koelsch* involved retirement benefits, we believe the logic of the quoted section is sound and applies herein.

[7] The trial court intended to give the appellant a separate property interest equal to one-half the value of the family

2. A.R.S. § 25-318(A) states that the trial court "shall ... divide the community, joint tenancy, and other property held in common equitably, though not necessarily in kind. .." A.R.S. § 25-318(C) allows the court to "impress a lien upon the . property awarded to either party in order to secure the payment of any ... equity the other party has in or to such property...."

residence. To secure this interest the trial court awarded appellant a lien apparently payable upon sale of the property, the date of which was unspecified. The effect of the trial court's award was to give appellant an immediate separate property interest wholly within the control of appellee. Such an arrangement is not contemplated by A.R.S. § 25–318 and is denounced by *Koelsch.*

We note that other jurisdictions have declined to allow similar, even less egregious liens on judgments. In *Marriage of Salter,* 45 Or.App. 555, 609 P.2d 374 (1980), the Oregon Appellate Court held that an interest bearing judgment enforceable by a lien payable fifteen years after its inception was an inequitable distribution of community assets. That court modified the trial court's award to include monthly payments within a reasonable period after the dissolution and shortening the time in which the entire judgment was to be satisfied.

In *Chrane v. Chrane,* 98 N.M. 471, 649 P.2d 1384 (1982), the New Mexico Supreme Court held that a lien against the former family residence payable upon the sale of the house or the ex-spouse's remarriage or death was an inequitable distribution of the community estate. The court reasoned:

> The net effect of leaving the home to the wife until she remarries or dies or decides to sell it, is to divest the husband of his equity in the property. In fact, he may never live to receive any portion of that equity.

Id. at 472, 649 P.2d at 1385.

We hold that the trial court's failure to give form and substance to appellant's lien results in an unequal property distribution which is arbitrary, unreasonable, and a deprivation of appellant's vested property interest in the community. We therefore remand for proceedings consistent with our holding.

JACOBSON and KLEINSCHMIDT, JJ., concur.